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No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

MARATHON OIL COMPANY, A CORPORATION,
Petitioner,

v.

GAIL HEATH and THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit.

REPLY MEMORANDUM OF PETITIONER

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I.

One of the basic tenets of respondents' argument is that the condemnation proceedings reflect an intention on the part of the railroad to take a fee.[1] The district court, on

[1] Respondents' brief (p. 6) states: "The condemnation proceedings here under consideration reflect a clear intent to take and a taking of the fee, and all lesser estates. Certainly, there is no language which can logically overcome the legal presumption to that effect."

whom rested the responsibility of construing the condemnation proceedings, held that they reflected an intent to take only an easement (Finding of Fact No. 7—App. 13, Conclusion of Law No. 3—App. 18, Decree—App. 24-25). Even the petitions filed by the railroad in the 1853 condemnation proceedings clearly manifested the intent to take only a right of way—that is an easement—because the nature of the property being taken is described several times as a right of way, roadway, or as being necessary for tracks, and in a table under the column headed "Material Etc. Wanted" the term "Right of way" was inserted (S. App.—C.A. 18-19, 30).

On this subject of the construction of the condemnation proceedings the court of appeals merely said that they reflected an intention "to take an interest in the lands condemned commensurate with the power granted by its charter." 358 F.2d at 36. (App. 4-5). But under its charter the railroad was not required to take a fee—it could take an easement or any of various other types of estates and interests.[2]

Moreover, as the court of appeals held, the condemnation proceedings were brought under the 1852 Act, and under that Act, as it was construed by the district court, the railroad could not take a fee. But assuming arguendo it could take a fee, it clearly could also take an estate less

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[2] See Section 4 of its legislative charter wherein it was provided the railroad could acquire, by both voluntary grants and eminent domain, lands and "any and all interests and estates therein . . . in fee, or otherwise." (App. 38)

than a fee, *viz.* an easement, and that is what the district court held it intended to take as the court construed the proceedings.

As a second major proposition respondents argue that under the 1852 Act the railroad had to condemn a fee and could not condemn a lesser estate.[3] In fact this proposition seems to form the basis of their construction of the condemnation proceedings as evidencing an intention by the railroad to take a fee and not an easement. In this construction of the 1852 Act, they are clearly wrong for reasons which we have shown in our petition. Not only is this compulsion aspect lacking but there cannot even be found in the 1852 Act a grant of any power to take a fee for right of way or trackage or any language from which such power can necessarily be implied. Respondents' brief contains nothing to impinge the decision of the district court or to refute the Illinois law as reviewed in our petition. Respondents are unable to cite any Illinois case holding that a fee was taken by condemnation under the 1852 Act or under any other Illinois statute similar to that Act.

II.

The provision of the 1870 Illinois constitution injected into respondents' argument has nothing to do with this case. The district court did not base its decision upon that section of the constitution or upon any case which turned on the provisions of the section. None of the cases cited by petitioner were decided on the basis of that constitutional provision.

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[3] Respondents' brief (p. 8) states: "Here, the railroad was expressly authorized to acquire the fee and, in fact, directed to do so if unable to acquire the real estate, or an acceptable interest therein, through a voluntary grant."

III.

If respondents mean by their statement on page 10 of their brief that we merely concede that the passages quoted on pages 2-3 of their brief from the *Bartlow* and *Keen* cases[4] appear in the official reports of those cases, they are correct. We do not concede that they are pronouncements by the Illinois Supreme Court of controlling principles of law because the *obiter dicta* in the two cases is so completely at variance with the established Illinois law that it has no value as precedent.

Respondents try to disparage what they call "deed construction cases" cited by petitioner but extol the quoted dictum from *Keen,* a "deed construction case", which in turn merely relied upon earlier dictum in *Bartlow.*

IV.

The necessity and propriety for granting certiorari in this case is as compelling as that which existed in *Carter Oil Co.* v. *Welker,* 24 F.Supp. 753 (E.D. Ill. 1938), aff. 112 F.2d 299 (7th Cir. 1940), cert. gr. 311 U.S. 633 (1940), rev. 317 U.S. 592 (1942). For other precedent see also *Magnolia Petroleum Co.* v. *Thompson,* 106 F.2d 217 (8th Cir.

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[4] *Bartlow* v. *C. B. & Q. R.R.,* 243 Ill. 332, 90 N.E. 721 (1909); *Keen* v. *C. C. & St. L. Ry.,* 392 Ill. 362, 64 N.E.2d 499 (1945).

1939), cert. den. and reh. gr. 308 U.S. 613 (1939), order vacated and cert. gr. 308 U.S. 630, rev'g ct. of app. and aff'g distr. ct. in part and remanding 309 U.S. 478 (1940).

Respectfully submitted,

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